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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION

14 OX LABS INC., a California
15 corporation,

16 Plaintiff,

17 v.

18 BITPAY, INC., a Delaware corporation,
19 and DOES 1-10,

20 Defendants.
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Case No. CV 18-5934-MWF(KSx)

**PLAINTIFF OX LABS INC.'S
OPPOSITION TO DEFENDANT
BITPAY, INC.'S MOTION FOR
JUDGMENT AS A MATTER OF
LAW**

Date: January 16, 2020, 3:00 p.m.
Place: Courtroom 5A

Pretrial Conference: January 27, 2020
Trial: February 4, 2020

TABLE OF CONTENTS

		<u>PAGE(S)</u>
1		
2		
3		
4	I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
5	II. ARGUMENT	2
6	A. BITPAY IS LIABLE FOR CONVERSION	2
7	1. BitPay “Liquidated” Ox Lab’s Property	
8	Without its Consent	2
9	2. BitPay Refused to Return 200 Bitcoins to	
10	Ox Labs Despite Ox Labs’ Lawful Demand	3
11	B. OX LABS IS ENTITLED TO THE RETURN OF 200 BITCOINS	4
12	1. Ox Labs is Entitled to 200 Bitcoins, Whether	
13	They are the Same Ones or Different Ones	5
14	2. Ox Labs Does Not Have to “Trace” its Bitcoins	
15	After BitPay Took Possession of Them	7
16	3. 200 Bitcoin Are 200 Bitcoins, Regardless How	
17	Their Value in Dollars Has Changed	10
18	4. This Court Applies State Law Sitting in Diversity,	
19	It Does Not Make California Law	11
20	C. ALTERNATIVELY, OX LABS IS ENTITLED TO APPROPRIATE	
21	MONETARY DAMAGES	13
22	III. CONCLUSION	15
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES**PAGE(S)****Cases**

<i>Adler v. Taylor</i> , CV 04-8472-RGK (FMOx), 2005 U.S. Dist. LEXIS 5862 (C.D. Cal. Feb. 2, 2005)	5
<i>Allstate Leasing Corp. v. Smith</i> , 238 Cal. App. 2d 128 (1965)	4, 5
<i>Alonso v. Badger</i> , 58 Cal. App. 2d 752 (1943)	2
<i>Bufano v. San Francisco</i> , 233 Cal. App. 2d 61 (1965)	14
<i>Caswell v. Putnam</i> , 120 N.Y. 153 (1890)	6
<i>Cerra v. Blackstone</i> , 172 Cal. App. 3d 604 (1985)	1, 2, 3
<i>Del Webb Communities, Inc. v. Partington</i> , 652 F.3d 1145 (9th Cir. 2011)	11
<i>Doe v. Cutter Biological</i> , 852 F. Supp. 909 (D. Idaho 1994)	11
<i>Express Media Group, LLC v. Express Corp.</i> , No. C 06-03504 WHA, 2007 U.S. Dist. LEXIS 34800 (N.D. Cal. May 10, 2007)	8
<i>Faulkner v. First National Bank</i> , 130 Cal. 258 (1900)	7, 8, 9
<i>Flores v. California Department of Corrections & Rehabilitation</i> , 224 Cal. App. 4th 199 (2014)	4, 8
<i>Fran-Well Heater Co. v. Robinson</i> , 182 Cal. App. 2d 125 (1960)	4, 5
<i>Gee v. Tenneco, Inc.</i> , 615 F.2d 857 (9th Cir. 1980)	11
<i>Horn v. Klatt</i> , 65 Cal. App. 2d 510 (1944)	5
<i>Jahn v. Brickey</i> , 168 Cal. App. 3d 399 (1985)	13

1	<i>Klingebiel v. Lockheed Aircraft Corp.</i> ,	11
2	494 F.2d 345 (9th Cir. 1974)	
3	<i>Lint v. Chisholm</i> ,	14
4	121 Cal. App. 3d 615 (1981)	
5	<i>Los Angeles Federal Credit Union v. Madatyan</i> ,	3
6	209 Cal. App. 4th 1383 (2012)	
7	<i>Lusitanian-American Development Co. v. Seaboard Dairy Credit Corp.</i> ,	2
8	1 Cal. 2d 121 (1934)	
9	<i>Mier v. Southern California Ice Co.</i> ,	3
10	56 Cal. App. 512 (1922)	
11	<i>Minsky v. Los Angeles</i> ,	1, 4, 13
12	11 Cal. 3d 113 (1974)	
13	<i>Moreno v. Greenwood Auto Ctr.</i> ,	14
14	91 Cal. App. 4th 201 (2001)	
15	<i>MTC Electric Technologies Co. v. Leung</i> ,	2
16	889 F. Supp. 396 (C.D. Cal. 1995)	
17	<i>Myers v. Stephens</i> ,	14
18	233 Cal. App. 2d 104 (1965)	
19	<i>Newhart v. Pierce</i> ,	3, 14
20	254 Cal. App. 2d 783 (1967)	
21	<i>Nicholson v. McDonald</i> ,	3
22	193 Cal. App. 2d 675 (1961)	
23	<i>Pacific-Southern Mortgage Trust Co. v. Insurance Co. of North America</i> ,	14
24	166 Cal. App. 3d 703 (1985)	
25	<i>Pilch v. Milikin</i> ,	5
26	200 Cal. App. 2d 212 (1962)	
27	<i>Richardson v. Shaw</i> ,	6
28	209 U.S. 365 (1908)	
	<i>Roam v. Koop</i> ,	13
	41 Cal. App. 3d 1035 (1974)	
	<i>Sher v. Sandler</i> ,	6
	90 N.E.2d 536 (Mass. 1950)	
	<i>State Farm Mutual Automobile Insurance Co. v. Rodriguez</i> ,	14
	568 B.R. 328 (2007)	
	<i>Trowbridge Sidoti LLP v. Taylor</i> ,	8
	No. 8:16-cv-00771-ODW-SK, 2018 U.S. Dist. LEXIS 93651 (C.D. Cal. June 4, 2018)	

1	<i>Tsai v. Wang</i> ,	
2	Case No. 17-cv-400614-DMR, 2017 WL 2587929	
3	(N.D. Cal. June 14, 2017).....	7

4 Statutes

5	Cal. Civ. Proc. Code § 3336.....	4, 8, 13, 14, 15
6	Cal. Civ. Proc. Code § 3379.....	4, 8, 9
7	Cal. Civ. Proc. Code § 3380.....	9

9 Other Authorities

10	2 Witkin, Cal. Procedure (2d ed. 1970) Actions, § 114	4
11	48 Cal. Jur. 2d § 20	3
12	48 Cal. Jur. 2d § 22	3
13	Hanburg and Maudsley,	
14	<i>Modern Equity</i> (12th ed. by J. Martin, 1985).....	10
15	Johns, California Damages: Law and Proof	
16	(5th ed. 1997) § 7.2(b).....	10
17	<i>Are You Ever Allowed to Spend Money That Was Mistakenly Deposited Into Your</i>	
18	<i>Bank Account?</i> , N.C. CONSUMERS COUNCIL, https:// www.ncconsumer.org/	
19	news-articles-eg/using-money-mistakenly-deposited-into-your-account.html	
20	<last visited December 26, 2019>	12
21	Miriam Caldwell, <i>What Happens If the Bank Makes a Deposit Into the Wrong</i>	
22	<i>Account?</i> , THE BALANCE, https://www.thebalance.com/ can-bank-make-deposits-	
23	to-wrong-account-2386128 <last visited December 26, 2019>	12

1 Plaintiff Ox Labs Inc. (“Ox Labs”) respectfully submits this memorandum in
2 opposition to the Motion for Judgment as a Matter of Law [Dkt. 66] (“Motion”) of
3 Defendant BitPay, Inc. (“BitPay”).

4 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

5 BitPay’s Motion is demonstrably wrong on the facts and the law. On the
6 facts, BitPay assumes matters that are squarely contradicted by its own admissions
7 and the uncontroverted evidence. Most critically, BitPay’s repeated assertions that
8 it is an “innocent recipient” that has done nothing “wrongful” are completely
9 undermined by its admissions that: (1) BitPay (supposedly and without permission)
10 sold Ox Labs’ 200 Bitcoins soon after receiving them, and (2) refused to return Ox
11 Labs’ 200 Bitcoins or their equivalent to Ox Labs upon lawful demand. Both of
12 these actions constitute conversion. *See Cerra v. Blackstone*, 172 Cal. App. 3d 604,
13 609 (1985) (“Unjustified refusal to turn over possession on demand constitutes
14 conversion *even where possession by the withholder was originally obtained*
15 *lawfully* and of course so does an unauthorized sale.”) (emphasis added, citations
16 omitted). BitPay is not “innocent” and certainly did something “wrongful.”

17 On the law, BitPay badly misunderstands the authority governing remedies
18 for conversion. As California’s highest court has held: “Where a wrongdoer has
19 converted . . . personal property, the injured owner must elect between his right of
20 ownership and possession (with the remedy of specific recovery) and his right to
21 compensation (with the remedies of damages for conversion or quasi-contract
22 recovery of value on theory of waiver of tort).” *Minsky v. L.A.*, 11 Cal. 3d 113, 121
23 (1974). Thus, Ox Labs is entitled to the return of 200 Bitcoins or appropriate
24 compensatory damages, at its election. BitPay’s Motion must therefore be denied.

II. ARGUMENT

A. BITPAY IS LIABLE FOR CONVERSION

1. BitPay “Liquidated” Ox Lab’s Property Without its Consent

BitPay contends throughout its moving papers and elsewhere that it sold Ox Labs’ 200 Bitcoins at some point after receiving them in error. *See, e.g.*, Motion at 3 (“It remains BitPay’s position that it liquidated the erroneous bitcoin for approximately \$57,000 on July 10, 2015.”). Despite its shifting and misleading exposition of the facts regarding this “liquidation,”¹ it is undisputed that any such sale incontrovertibly took place, if at all, without Ox Labs’ consent.² In other words, BitPay concedes that it converted Ox Labs’ property. *See MTC Elec. Techs. Co. v. Leung*, 889 F. Supp. 396, 403 (C.D. Cal. 1995) (“[A]ny unauthorized sale or transfer of another’s property constitutes conversion.”) (citing *Cerra*, 172 Cal. App. 3d at 609); *Alonso v. Badger*, 58 Cal. App. 2d 752, 758 (1943) (“The action of appellant in exercising dominion and control over the property of respondents and making a sale thereof without such owners’ consent amounted to a conversion.”) (citing *Lusitanian-Am. Dev. Co. v. Seaboard Dairy Credit Corp.*, 1 Cal. 2d 121, 129 (1934)).

BitPay’s repeated protestations that it *received* the 200 Bitcoins innocently does not alter the critical fact is that it *disposed of* Ox Labs’ property without Ox

¹ As discussed below in response to BitPay’s “tracing” argument, BitPay is the sole party in a position to say what happened to the Bitcoins at issue after BitPay received them, BitPay refused to provide any discovery on the question, and BitPay cannot definitively say what happened to the Bitcoins.

² It is undisputed that Ox Labs was unaware that BitPay received the 200 Bitcoins until long after BitPay asserts its “liquidated” them. *See* Pretrial Conference Order [Dkt. 54] (“Pretrial Order”) at 3 (Stipulation No. 11). Any sale or transfer was unquestionably done without Ox Labs’ permission. *See* Thobhani MSJ Dec. [Dkt. 31-2] at ¶¶ 4-5, 7; Thobhani Supp. Dec. [Dkt. 67-2] at ¶¶ 3-5.

1 Labs' permission. *See Mier v. S. Ca. Ice Co.*, 56 Cal. App. 512, 517 (1922) (“[T]he
 2 general rule is that one who sells the property of another, *even though he believes*
 3 *he has a right so to do*, is liable in trover to the true owner.”) (emphasis added,
 4 citations omitted); *Newhart v. Pierce*, 254 Cal. App. 2d 783, 793 (1967) (noting
 5 that a “taking clouded by mistake is no less a wrongful taking” and the “wrongful
 6 exercise of dominion over another’s personal property is the gist of the action”)
 7 (citations omitted). Whether BitPay knew or did not know the property belonged to
 8 someone else is immaterial. “Conversion is a strict liability tort. The foundation of
 9 the action rests neither in the knowledge nor the intent of the defendant. Instead,
 10 the tort consists in the breach of an absolute duty; the act of conversion itself is
 11 tortious. Therefore, questions of the defendant’s good faith, lack of knowledge, and
 12 motive are ordinarily immaterial.” *Los Angeles Fed. Credit Union v. Madatyan*,
 13 209 Cal. App. 4th 1383, 1387 (2012).

14 **2. BitPay Refused to Return 200 Bitcoins to Ox Labs Despite** 15 **Ox Labs’ Lawful Demand**

16 BitPay’s refusal to return 200 Bitcoins to Ox Labs is a second basis for its
 17 liability. The parties have stipulated that Ox Labs demanded the return of 200
 18 Bitcoins on May 27, 2017, and BitPay refused that demand on June 6, 2017. *See*
 19 Pretrial Conference Order [Dkt. 54] (“Pretrial Order”) at 3 (Stipulation Nos. 9 &
 20 10). BitPay’s continuing refusal to return 200 Bitcoins to Ox Labs, despite
 21 repeated demands, constitutes conversion. *See Cerra*, 172 Cal. App. 3d at 609
 22 (“Unjustified refusal to turn over possession on demand constitutes conversion even
 23 where possession by the withholder was originally obtained lawfully”) (citation
 24 omitted); *Nicholson v. McDonald*, 193 Cal. App. 2d 675, 680 (1961) (“McDonald
 25 had no legal right to retain the property in his possession, and therefore his refusal
 26 to give up possession on Nicholson’s demand amounted to conversion.”) (citing 48
 27 Cal. Jur. 2d §§ 20 and 22, pp. 557, 562)).

1 BitPay's assertion that "it cannot return what it no longer has" (Motion at 2)
 2 is both patently false and beside the point. BitPay has admitted that at all times
 3 relevant to this case it has had 200 Bitcoins in its possession that it could return to
 4 Ox Labs. *See* Pretrial Order at 3 (Stipulation No. 11). BitPay's wrongful sale of
 5 Ox Labs property is not a defense to liability or an excuse for refusing to return like
 6 property. Thus in a common law action for "detinue," a species of the modern tort
 7 of conversion where the plaintiff sought the return of personal property wrongfully
 8 detained, "it was no defense . . . to plead that the defendant, before the
 9 commencement of the action, had wrongfully disposed of the property, and,
 10 therefore, was not in possession of it." *Fran-Well Heater Co. v. Robinson*, 182 Cal.
 11 App. 2d 125, 130 (1960) (citation and internal quotation marks omitted). Because
 12 the defendant had no right to dispose of the contested property absent consent from
 13 the plaintiff "it does not lie in his mouth to set up his wrongful act in answer to such
 14 action, or to say that he is unable to comply with the demand for possession
 15 because of his own breach of duty." *Id.* at 131 (citation and internal quotation
 16 marks omitted).

17 **B. OX LABS IS ENTITLED TO THE RETURN OF 200 BITCOINS**

18 With conversion liability established, Ox Labs is now entitled to elect among
 19 the available remedies for conversion. *See Minsky*, 11 Cal. 3d at 121 ("Where a
 20 wrongdoer has converted . . . personal property, the injured owner must elect
 21 between his right of ownership and possession (with the remedy of specific
 22 recovery) and his right to compensation (with the remedies of damages for
 23 conversion or quasi-contract recovery of value on theory of waiver of tort).") (citing
 24 2 Witkin, Cal. Procedure (2d ed. 1970) Actions, § 114, p. 983); *Flores v. Cal. Dep't*
 25 *of Corrs. & Rehab.*, 224 Cal. App. 4th 199, 206 (2014), *review denied* (Apr. 30,
 26 2014) ("Available remedies for conversion include specific recovery of property
 27 with damages for its detention and damages based on the value of the property.")
 28

(citing Cal. Civ. Code §§ 3336, 3379; *Allstate Leasing Corp. v. Smith*, 238 Cal. App. 2d 128, 132-133 (1965)); *Adler v. Taylor*, CV 04-8472-RGK (FMOx), 2005 U.S. Dist. LEXIS 5862, at *9 (C.D. Cal. Feb. 2, 2005) (“Because the Complaint supports a conversion claim, it also supports a specific recovery remedy.”).

BitPay raises four meritless arguments against specific recovery: (1) BitPay no longer has Ox Labs’ exact 200 Bitcoins and therefore cannot “return” them; (2) Ox Labs has the duty to “trace” its 200 Bitcoins to BitPay’s current Bitcoin holdings; (3) the value of Bitcoin has changed over time; and (4) it would set a “dangerous precedent” to grant Ox Labs the relief California law authorizes. *See* Motion at 2-6. Each argument fails as a matter of law and common sense.

1. Ox Labs is Entitled to 200 Bitcoins, Whether They are the Same Ones or Different Ones

BitPay’s first argument is that it no longer possesses the exact same Bitcoins that Ox Labs erroneously provided and therefore cannot return them. (Motion at 2-4.) Again, since BitPay concedes that it wrongfully sold or detained Ox Labs’ property, “it does not lie in [BitPay’s] mouth . . . to say that [it] is unable to comply with the demand for possession because of [its] own breach of duty.” *Fran-Well Heater*, 182 Cal. App. 2d at 131 (citation and internal quotation marks omitted). Under California law, it is “immaterial” to a claim of conversion “that the property in question may be in the actual possession of a third party.” *Pilch v. Milikin*, 200 Cal. App. 2d 212, 224 (1962).

BitPay cites no authority for its further assertion that it cannot be ordered to return 200 Bitcoins identical in all material respects to the Bitcoins Ox Labs mistakenly provided. California law clearly permits such relief. *See Horn v. Klatt*, 65 Cal. App. 2d 510, 521 (1944) (“[W]here the subject matter consists of chattels or choses in action which are identical in kind and quality with other chattels or choses in action, restitution may be made by giving other things of the same kind and

1 quality.”). *Horn* cites the Restatement of Restitution for this proposition and
2 specifically mentions “shares in a corporation” and “bonds issued by a corporation”
3 as examples of such fungible items. Thus in *Richardson v. Shaw*, 209 U.S. 365,
4 378-79 (1908), the U.S. Supreme Court held that a “certificate of the same number
5 of shares, although printed upon different paper and bearing a different number,
6 represents precisely the same kind and value of property as does another certificate
7 for a like number of shares of stock in the same corporation” and further noted it is
8 a “misconception of the nature of the certificate to say that a return of a different
9 certificate or the right to substitute one certificate for another is a material change in
10 the property right held.”

11 In *Richardson*, the Supreme Court relied upon *Caswell v. Putnam*, 120 N.Y.
12 153 (1890), which explained that:

13 [O]ne share of stock is not different in kind or value from every other
14 share of the same issue and company. They are unlike distinct articles
15 of personal property which differ in kind and value, such as a horse,
16 wagon or harness. The stock has no earmark which distinguishes one
17 share from another, so as to give it any additional value or importance;
like grain of a uniform quality, one bushel is of the same kind and
value as another.

18 *Id.* at 157. BitPay cites no cases and makes no arguments that would justify
19 treating Bitcoins any differently. BitPay can and must be ordered to return 200
20 Bitcoins to Ox Labs. *See Sher v. Sandler*, 90 N.E.2d 536, 540 (Mass. 1950)
21 (holding that a prevailing plaintiff had a right to 125 corporate shares wrongfully
22 acquired by the defendant, rejecting the defendant’s argument that it no longer had
23 the same shares because it was not “material that they are not the original shares
24 owned by the plaintiff” and affirming that the plaintiff “ought not to be deprived of
25 that right because the defendant happens to hold the same number of shares in a
26 different certificate.”).

1 **2. Ox Labs Does Not Have to “Trace” its Bitcoins After BitPay**
 2 **Took Possession of Them**

3 BitPay makes the remarkable – and totally unsupported – assertion that a
 4 plaintiff deprived of its property cannot recover the property if it cannot trace what
 5 the defendant did with it. *See, e.g.*, Motion at 2 (“Plaintiff cannot show that BitPay
 6 had control of the erroneously credited bitcoin beyond July 10, 2015, and certainly
 7 not beyond July 14, 2015.”); *id.* at 5 (“As noted above, Plaintiff cannot identify
 8 what happened to the 200 bitcoin it credited to Defendant on July 10, 2015.”). This
 9 contention flies in the face of long-standing California law, which does not reward
 10 a guilty converter for transferring or selling the property to another person after he
 11 first gained lawful possession of it. *See Faulkner v. First Nat’l Bank*, 130 Cal. 258,
 12 265 (1900) (“[T]hough possession by the defendant must be proved, yet it is not
 13 necessary that it shall be continued up to the time of the commencement of the
 14 suit”) (citation and internal quotations marks omitted). In *Faulkner*, the Court cited
 15 numerous authorities for this very proposition in concluding: “It has been held
 16 from a very early time that where a chattel has been bailed to a person it does not
 17 lie in his mouth to set up his own wrongful act in answer to an action of detinue,
 18 though the chattel has ceased to be in his possession at the time of the demand.” *Id.*
 19 at 266 (citation and internal quotation marks omitted).

20 BitPay further asserts that Ox Labs has not identified the “specific personal
 21 property claimed . . . with a reasonable degree of certainty.” *See* Motion at 5
 22 (quoting *Tsai v. Wang*, Case No. 17-cv-400614-DMR, 2017 WL 2587929, at *13
 23 (N.D. Cal. June 14, 2017)). The assertion is patently absurd. BitPay *quotes* the
 24 very documentation that Ox Labs provided long before suit identifying the 200
 25 Bitcoins inadvertently credited to BitPay. *See* Motion at 4, footnote 3. BitPay even
 26 acknowledges in the very same footnote: “*These are the 200 bitcoins SFOX*
 27 *erroneously credited to BitPay*” (emphasis added). Ox Labs produced this
 28

1 documentation in discovery, and it appears on the Exhibit List the parties jointly
 2 submitted for trial. *See* Joint Exhibit List [Dkt. 53], Plaintiff’s Exhibit 153. In
 3 short, BitPay expects Ox Labs and the Court to ignore the evidence BitPay itself
 4 has offered and accept the ridiculous proposition that BitPay sent \$57,000 to Ox
 5 Labs in an attempt to settle the matter without BitPay knowing “with a reasonable
 6 degree of certainty” which property Ox Labs is claiming. This is not the sort of
 7 thing a busy federal court or a jury should be wasting their time considering.

8 The Court can also readily dispose of BitPay’s argument that “Plaintiff cites
 9 Cal. Civ. Code § 3379” but “that code section is for a replevin action, which is an
 10 entirely separate cause of action and remedy.” (Motion at 4.) The California Court
 11 of Appeal has cited the same code section as a basis for specific recovery in a
 12 conversion action. *See Flores*, 224 Cal. App. 4th at 206. In addition, both section
 13 3379 and 3336 are found within Division 4, Part 1 of the Civil Code, aptly titled
 14 “Relief,” under the Specific and Preventive Relief and Compensatory Relief Titles,
 15 respectively. They set out remedies, not causes of action. Finally, the California
 16 Supreme Court has long rejected such labeling games in the context of claims for
 17 the return of property. *See Faulkner*, 130 Cal. at 264 (“[W]e have here no forms of
 18 civil actions. We have only one form of action, which has no name; so that an
 19 action cannot be here defeated, as it could have been at common law, because not
 20 properly named.”).³

21
 22 ³ Federal district courts have also recognized that specific recovery is a remedy in a
 23 conversion action based on California law. *See, e.g., Trowbridge Sidoti LLP v.*
 24 *Taylor*, No. 8:16-cv-00771-ODW-SK, 2018 U.S. Dist. LEXIS 93651, at *11-14
 25 (C.D. Cal. June 4, 2018) (a plaintiff may seek specific recovery *or* damages under
 26 California law if specific recovery is pleaded and not abandoned before trial);
 27 *Express Media Grp., LLC v. Express Corp.*, No. C 06-03504 WHA, 2007 U.S. Dist.
 28 LEXIS 34800, at *12 (N.D. Cal. May 10, 2007) (along with the remedies for
 conversion enumerated in Cal. Civ. Code § 3336 “[p]laintiffs may also be entitled
 to specific recovery of the converted property in addition to monetary damages.
 Cal. Civ. Code §§ 3379-3380.”)

1 There can be no question that Ox Labs has simply and precisely identified
 2 the property claimed. In fact, the parties stipulated that Ox Labs inadvertently
 3 credited the 200 Bitcoins at issue to BitPay’s account. *See* Pretrial Motion at 3,
 4 Stipulation No. 5. Furthermore, BitPay cites no authority – because there is none –
 5 that would force a plaintiff to “trace” the fate of its wrongfully withheld property
 6 after the wrongdoer gained possession. To the contrary, the California Supreme
 7 Court has specifically rejected that proposition, citing the “maxim that no one can
 8 take advantage of his own wrong.” *Faulkner*, 130 Cal. at 266 (citations and internal
 9 quotation marks omitted).

10 Even if “tracing” were required, BitPay is the party who should have this
 11 information but can only provide a shifting and contradicting account of it. In its
 12 summary judgment briefing, BitPay (falsely and misleadingly) asserted that it sold
 13 Ox Labs’ 200 Bitcoins on Ox Labs’ own exchange, SFOX, on July 10, 2015. Mot.
 14 For Summary Judgment [Dkt. 29] at 3 (citing Getch Decl. [Dkt. 29-5] ¶ 5 and
 15 Exhibit B [Dkt. 29-7] thereto). After counsel for Ox Labs pointed out that BitPay’s
 16 then-CEO had acknowledged that the 200 Bitcoins were instead transferred to
 17 Kraken, a competing virtual currency exchange, on May 18, 2017 (Thobhani Supp.
 18 Dec. at ¶ 4 & Exh. A at 1), BitPay now clings to its original and insupportable
 19 assertion but confusingly and contradictorily retreats to a new argument that it
 20 “liquidated to zero” its Bitcoin holdings on all exchanges by July 15, 2017, and
 21 therefore had to have sold Ox Labs’ Bitcoins (although it tellingly does not say it
 22 “sold” them and cannot or will not identify when, where or to whom). (Motion at
 23 3.) BitPay spins out this convoluted narrative despite the fact that it refused to
 24 produce any evidence regarding its Bitcoin holdings in discovery and specifically
 25 objected that such evidence is “irrelevant.” May 22, 2019 BitPay’s Responses to
 26 Ox Labs’ First Set of Interrogatories at 3-4. BitPay’s “tracing” argument must be
 27 roundly rejected.

1 **3. 200 Bitcoin Are 200 Bitcoins, Regardless How Their Value**
2 **in Dollars Has Changed**

3 BitPay's next argument, also unsupported by any legal authority, is that
4 specific recovery and restitution are not available remedies when the property
5 converted has changed substantially in value. *See* Motion at 4-5. The law does not
6 address this argument because it defies logic. If a plaintiff establishes that a
7 defendant wrongfully took possession of 50 gold coins and refused to return 50
8 gold coins to the plaintiff, despite having 50 like gold coins it could supply, no
9 court would deny the plaintiff the return of 50 gold coins simply because the price
10 of gold in U.S. dollars had dramatically risen in the time since the defendant
11 wrongly asserted dominion over the plaintiff's property. The *defendant* bears the
12 risk of such a rise in value because it wrongfully kept the property and refused to
13 return it. It is the *plaintiff* who has been deprived of that rise in value, and the
14 defendant could have avoided some or all of it by returning the item or its
15 equivalent upon demand. In similar manner, the cases discussed above regarding
16 stock certificates and corporate bonds clearly involved instruments that fluctuate in
17 value. That did not prevent the courts from awarding return of the property at issue
18 or their equivalent. To prevent a tortfeasor from profiting from his or her
19 wrongdoing (such as when converted property increases in value), courts have
20 permitted the recovery of net profits in addition to the value of the property at the
21 time of conversion (*e.g.*, Johns, California Damages: Law and Proof (5th ed. 1997)
22 § 7.2(b), p. 7-4) or taken into account increased value when determining equitable
23 remedies (*e.g.*, Hanburg and Maudsley, *Modern Equity* (12th ed. by J. Martin,
24 1985) p. 306 ("Thus, in a case of unjust enrichment, the plaintiff will sue in quasi-
25 contract for recovery; but if the defendant still has the property, and either the
26 plaintiff wants specific recovery, or the defendant is insolvent, or the property has
27 increased in its value while the defendant held it, the plaintiff will be able to rely

upon the proprietary remedy of a constructive trust.”). In short, the fact that property may change in value does not immunize a tortfeasor from returning the same property or its equivalent.

4. This Court Applies State Law Sitting in Diversity, It Does Not Make California Law

BitPay’s final argument is that this Court would set a “dangerous precedent” by awarding Ox Labs the remedies of restitution or specific recovery that California law authorizes. (Motion at 5-6.) The argument is a desperate scare tactic and betrays a fundamental misunderstanding of the role federal courts play in diversity actions. “‘The task of a federal court in a diversity action is to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum.’” *Del Webb Cmty., Inc. v. Partington*, 652 F.3d 1145, 1154 (9th Cir. 2011) (quoting *Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980)). The Court is “to ascertain and apply the existing California law, not to predict that California may change its law and then to apply the federal court’s notion of what that change might or ought to be.” *Klingebiel v. Lockheed Aircraft Corp.*, 494 F.2d 345, 346 (9th Cir. 1974). In sum, as a “federal court exercising jurisdiction over this case based on diversity of citizenship among the parties, it is the role of this court to apply, and not to make, [state] law.” *Doe v. Cutter Biological*, 852 F. Supp. 909, 923 (D. Idaho 1994).

If the Court nevertheless indulges BitPay’s scare tactic, it will quickly see that the argument is baseless. Awarding Ox Labs its wrongfully withheld Bitcoins will not “encourage negligence and corporate recklessness by creating incentives for future parties in Plaintiff’s position to allow errors to occur and shift the burden of those errors to the innocent party.” (Motion at 5.) There is no evidence that Ox Labs made the crediting error in this matter in hopes of obtaining unjustified profits without risk. To the contrary, Ox Labs diligently tried to locate the source of the

error, but it was unable to determine that BitPay had received the erroneous transfer. Thobhani MSJ Dec. at ¶ 4. By applying California law neutrally and fairly according to its letter, the Court will encourage recipients of erroneously provided benefits to keep track of their accounts, assure that they are entitled to benefits they receive at the time they receive them, notify the sender promptly if they may not be entitled to them, and return the benefits if they were provided in error. This is precisely what consumer advisers regularly tell everyday Americans. *See, e.g., Are You Ever Allowed to Spend Money That Was Mistakenly Deposited Into Your Bank Account?*, N.C. CONSUMERS COUNCIL, <https://www.ncconsumer.org/news-articles-eg/using-money-mistakenly-deposited-into-your-account.html> <last visited December 26, 2019> (“If you ever run into a situation where you notice an unexpected deposit, you should leave it alone and notify your financial institution as soon as possible.”); Miriam Caldwell, *What Happens If the Bank Makes a Deposit Into the Wrong Account?*, THE BALANCE <https://www.thebalance.com/can-bank-make-deposits-to-wrong-account-2386128> <last visited December 26, 2019> (“It is essential that you balance your checkbook or check your actual account balance on a regular basis. This can help you detect any discrepancies with your account, whether it be an accidental deposit to your account, an erroneous charge, or accidental credit.”); *id.* (“If you spent any of this money, you will be responsible for paying it back. In some cases, and if the amount is large enough, you could also face criminal charges for spending money that isn’t yours.”).

BitPay provides no reasoned basis in fact or law why a corporate entity should not be responsible, like ordinary consumers, for keeping track of its accounts, notifying a transferor promptly if an erroneous credit is made, and returning such property. This is precisely what California law incentivizes, and it is not the role of this Court to re-write long-standing tort principles of state law. BitPay concedes it committed acts of conversion. Like any other defendant, it must

1 provide the authorized remedy for its tortious conduct. BitPay must be ordered to
2 return 200 Bitcoins to Ox Labs.

3 **C. ALTERNATIVELY, OX LABS IS ENTITLED TO**
4 **APPROPRIATE MONETARY DAMAGES**

5 If the Court agrees that Ox Labs is entitled to the return of 200 Bitcoins, then
6 it need go no further. Ox Labs will pursue compensatory damages, as authorized
7 by Section 3336 of the California Civil Code (“Section 3336”), only if the Court or
8 the jury decline to award Ox Labs the return of its property. *See Minsky*, 11 Cal. 3d
9 at 121. However, Ox Labs is not required to elect its remedy at this stage. *See*
10 *Roam v. Koop*, 41 Cal. App. 3d 1035, 1039 (1974) (“Ordinarily a plaintiff need not
11 elect, and cannot be compelled to elect, between inconsistent remedies during the
12 course of trial prior to judgment.”); *Jahn v. Brickey*, 168 Cal. App. 3d 399, 406
13 (1985) (rejecting argument that election of remedies must be made prior to
14 submission of case to jury).

15 Significantly here, BitPay does *not* argue that Ox Labs is not entitled to
16 damages under Section 3336. Since liability is established, per the discussion
17 above, BitPay therefore concedes that Ox Labs is entitled to “[t]he value of the
18 property at the time of the conversion, with the interest from that time” and “fair
19 compensation for the time and money properly expended in pursuit of the
20 property.” *See* Section 3336. This amount vastly exceeds the approximately
21 \$57,000 BitPay “tendered” and now asserts as the upper limit of Ox Labs’ recovery.

22 The self-serving mistake that BitPay has made in its current Motion (which it
23 first perpetuated in its Motion for Summary Judgment) is assuming that the “time
24 of the conversion” for purposes of Section 3336 is the time when Ox Labs first
25 made the crediting error, *i.e.*, July 10, 2015. *See* Pretrial Order at 3 (Stipulation No.
26 5). That is not “the time of the conversion.” Instead, under controlling California
27 law, the time of the conversion here, where the property was not taken unlawfully
28

1 but instead was erroneously provided, is when “the return of the property has been
 2 demanded and refused.” *See Bufano v. San Francisco*, 233 Cal. App. 2d 61, 70
 3 (1965). That date is June 6, 2017 (Pretrial Order at 3, Stipulation No. 10), and the
 4 value of one Bitcoin on that date was **\$2,834.21** (*id.* at 4, Stipulation (d)). In other
 5 words, the value of the property at the time of the conversion is 200 x \$2,834.21 or
 6 **\$566,842**. Prejudgment interest of 7% running from June 6, 2017, which will
 7 continue to accrue until entry of judgment, would currently yield an additional
 8 **\$101,860.73** as of December 30, 2019. *See Moreno v. Greenwood Auto Ctr.*, 91
 9 Cal. App. 4th 201, 209 (2001); *Pacific-Southern Mortg. Trust Co. v. Ins. Co. of N*
 10 *Am.*, 166 Cal. App. 3d 703, 716 (1985); *State Farm Mut. Auto. Ins. Co. v.*
 11 *Rodriguez*, 568 B.R. 328, 347 (2007). In short, BitPay is entitled, at a minimum, to
 12 **\$668,702.73** before consideration of the “fair compensation for the time and money
 13 properly expended in pursuit of the property.” *See* Section 3336.

14 Section 3336 alternatively permits a conversion plaintiff to seek damages in
 15 “an amount sufficient to indemnify the party injured for the loss which is the
 16 natural, reasonable and proximate result of the wrongful act complained of and
 17 which a proper degree of prudence on his part would not have averted.” Section
 18 3336. “[W]here proof establishes an injury beyond that which would be adequately
 19 compensated by the value of the property and interest, the court may award such
 20 amounts as will indemnify for all proximate reasonable loss caused by the wrongful
 21 act.” *Lint v. Chisholm*, 121 Cal. App. 3d 615, 624–625 (1981) (internal citations
 22 omitted). “In exceptional circumstances, to avoid injustice, loss of profits may be
 23 the measure.” *Newhart v. Pierce*, 254 Cal. App. 2d 783, 794 (1967) (internal
 24 citation omitted); *Myers v. Stephens*, 233 Cal. App. 2d 104, 119 (1965) (“Turning
 25 to the present case in the light of these principles, we are satisfied that plaintiff has
 26 established a satisfactory basis for estimating what his anticipated profits would
 27 have been had there been no tort.”).

1 There is no doubt in this case that Ox Labs suffered an injury “beyond that
 2 which would be adequately compensated by the value of the property [at the time of
 3 the conversion] and interest.” BitPay admits that the value of 200 Bitcoins is
 4 currently approximately **\$3 Million**. *See* Motion at 1 (“Today, 200 bitcoin is worth
 5 approximately three million dollars.”). And that is before the jury even considers
 6 the value of the “hard fork benefits” Ox Labs was deprived of (Pretrial Order at 3,
 7 Stipulation Nos. 11 & 12, *id.* at 4 Stipulations (g)-(k)) or the prejudgment interest
 8 and fair compensation for the time and money Ox Labs properly expended in
 9 pursuit of the property that Section 3336 expressly authorizes. In short, in the
 10 unlikely event that the Court determines that Ox Labs is not entitled to the return of
 11 200 Bitcoins *simpliciter*, the parties will need to present their damages case to the
 12 jury, with exposure to BitPay well in excess of \$3 Million.

13 **III. CONCLUSION**

14 BitPay has admitted facts establishing its liability for conversion. Ox Labs is
 15 therefore entitled to the return of 200 Bitcoins. This relief is authorized by
 16 California law and will not require a trial. If the Court find that such relief is either
 17 not available or that a jury must resolve some subsidiary fact issue before it can be
 18 awarded, Ox Labs is also entitled to present its case for appropriate compensatory
 19 damages, well exceeding \$3 Million at today’s values, for jury determination.
 20 BitPay’s Motion for Judgment as a Matter of Law must be DENIED.

21
 22 Dated: December 30, 2019

Respectfully Submitted,

LEIDER + AYALA-BASS LLP

24 By: /s/ Philip A. Leider
 Philip A. Leider

26 Attorneys for Plaintiff
 27 OX LABS INC.

CERTIFICATE OF SERVICE

I certify that counsel of record, listed below, is being served on December 30, 2019, with a copy of this document through the CM/ECF Filing System as identified on the Notice of Electronic Filing dated December 30, 2019.

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